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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 197

SEYMOUR S. LIEBERMAN, *Petitioner,*

vs.

THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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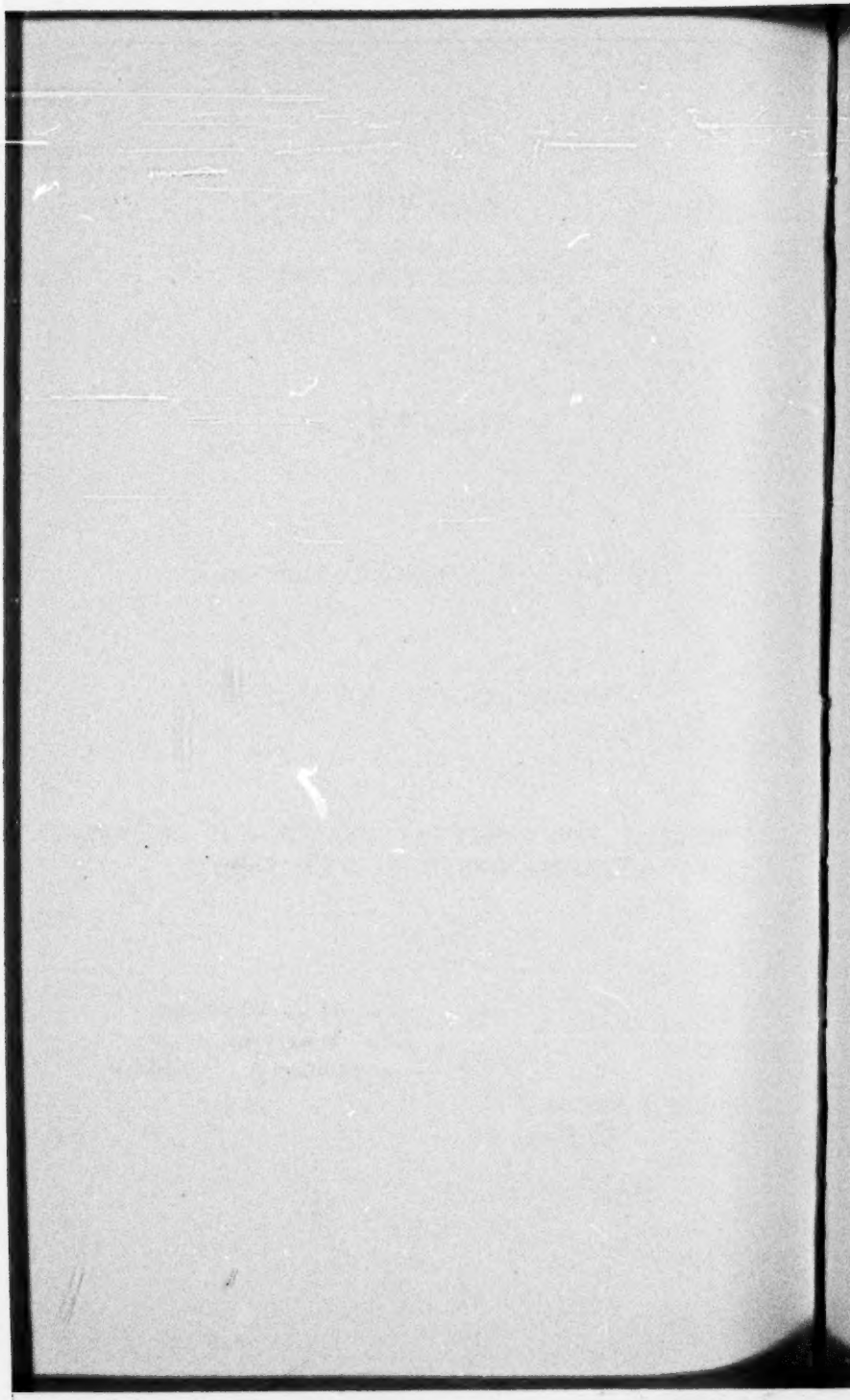

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THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey, entered on June 15, 1953, which affirmed the judgment of the Appellate Division of the Superior Court of New Jersey on an appeal from the conviction before the Superior Court of New Jersey, Law Division (Criminal), Union County, for making and taking book upon the running of horses.

Opinion Below

The opinion by the Superior Court of New Jersey is not yet officially reported. The same is contained in the documents certified by the Clerk of the New Jersey Supreme Court.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on June 15, 1953. The jurisdiction of this Honor-

able Court is invoked by virtue of Title 28 U.S.C.A. Sec. 1257(3).

Questions Presented

Was defendant denied due process of law under Article 14, Sec. 1 of the United States Constitutional Amendment by reason of the inflammatory and prejudicial remarks by the Prosecutor during his summation to the Jury?

Statement

Petitioner, Seymour S. Lieberman, was indicted together with one Victor Bogen by a Union County Grand Jury for willfully and unlawfully making and taking book upon the running of horses, contrary to R.S. 2:153-3.

Both defendants pleaded not guilty. The issues were tried before the Superior Court of New Jersey, Union County, Law Division (Criminal) before the Honorable Walter L. Hetfield, III, and a Jury on June 17, 1952. At the close of the State's case the Court directed a verdict of dismissal against one defendant, Victor Bogen.

The trial continued as to petitioner, Seymour S. Lieberman, and there was a judgment of conviction found against him on June 17, 1952.

The record of the questioned remarks of the prosecuting attorney, upon which the Supreme Court of New Jersey based its opinion, are herewith set forth: (App. pp. 76a-77a).

> "During the course of his summation, Mr. Sellers stated: '—and we had the Kefauver investigation.'
>
> Mr. Liotta: I object to this and I submit that his remarks are unwarranted.
>
> "Mr. Sellers: I believe I have a right to comment upon public events.
>
> "Mr. Liotta: We are not interested in the Kefauver investigation.
>
> "The Court: He is merely commenting on the weight that should be given character witnesses.

"Mr. Liotta: But the fact is that he has come out with something that happened in the Kefauver investigation.

"The Court: I don't know what he said about that.

"Confine your argument to the points relative to the evidence received.

"Mr. Sellers: I was attacking the character witnesses, that is the reason I referred to the Kefauver investigation and no other reason.

"The Court: There is no evidence what these witnesses did in the Kefauver investigation.

"Mr. Liotta: He also brought out the fact that there was a banker in Perth Amboy that had the finest reputation, but that has nothing to do with this case.

"The Court: I agree with you.

"Mr. Sellers: I will withdraw that, and I am sorry. I apologize.

"Mr. Liotta: If the Court please, I move for mistrial because the damage has been done.

"The Court: I will deny your motion and order the jury to disregard the remarks about the banker in Perth Amboy and any investigation conducted by Senator Kefauver. Confine your argument to the material facts in this case."

The Prosecutor continued his summation, and after an interval, the following occurred: (App. p. 78a).

". . . Another thing, it is legal to bet in New Jersey at the legal race track, where the bets are carefully checked and the odds are figures after breakage and after the State gets a cut and the track gets a cut. What odds do these fellows pay? They take more than Monmouth Park, and they do not even play square with the bettor.

"Mr. Liotta: I object to that.

"The Court: There is no evidence that the bookmakers do not play square with the bettors. I don't know what the odds are. They may be more than the pari-mutual pay, but there is no evidence as to that. Proceed and confine your summation to the evidence."

The Prosecutor went on and concluded with: (App. p. 78a).

> "I leave it entirely to you. I live in Union County, and you know what goes on. You read the papers and you know what goes on. It is entirely up to the people. I leave the case for you to decide. Thank you."

To this last no objection was interposed by the defendant.

Stenographic records of summations are not taken in the Courts of New Jersey. This situation, arising out of the present case, has prompted the Supreme Court of New Jersey to make a sudden rule requiring opening and closing statements of both parties to be taken stenographically. The above quoted part of the summation in this case, which said Supreme Court accepted as substantially correct, will be referred to subsequently.

An appeal was taken to the Superior Court (Appellate Division) and the judgment was affirmed, *23 N. J. Super. 531 (1952)*. In said Appellate Court, the petitioner set out as one of his points of argument that the lower court erred in refusing to grant a mistrial by reason of the prejudicial remarks of the Prosecutor.

The Supreme Court of New Jersey then granted certification upon petitioner's request, *11 N. J. 580 (1953)*. Again, one of the questions presented before the Supreme Court of New Jersey was, did the Superior Court err in refusing a mistrial because of the prejudicial remarks of the Prosecutor in summation and did the Appellate Division of the Superior Court err in stating that the remarks of the Prosecutor were not prejudicial? The Supreme Court of New Jersey affirmed the judgment of the Appellate Division on June 15, 1953.

Specification of Errors to Be Urged

The Supreme Court of New Jersey erred in holding that this petitioner was granted due process of law, in spite

of the unjustified and prejudicial remarks made by the prosecutor in summation that deprived this petitioner of a fair trial and in affirming the judgment of conviction in the Superior Court of New Jersey, Law Division (Criminal).

Reasons for Granting the Writ

1. The decision of the court below is in conflict with *Berger v. U. S.*, 295 U. S. 78 (1935), a case the Supreme Court of New Jersey cited with approval, after referring to Canon 5 of the Canons of Professional Ethics, which states: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." *Minker* v. *U. S.*, 85 F. 2d 425 (3C.C.A.) 1941; *Viereck* v. *U. S.*, 318 U. S. 236 (1943).

The above cases hold that the oratory, eloquence and argument of prosecuting attorneys should be restricted to a discussion of the facts disclosed by the evidence or legitimate inferences therefrom and prosecutors cannot resort to tactics calculated to inflame a jury and prejudice it against the accused. Unless their conduct is so restrained, the defendant is unavoidably denied a fair trial.

An unfair comment by the Prosecutor was to allude to the Kefauver investigation upon the pretext that it was a legitimate remark to make pertaining to the weight to be given character witnesses. The Court, after objection, told the Prosecutor to confine his argument to the points relative to the evidence received. (App. pp. 76a-77a). A more damaging blow to the hopes of this petitioner to get a fair trial was when the Prosecutor, in a foul assault in his further comment on character witnesses, warned the jury about the banker of the highest reputation in Perth Amboy. (App. p. 77a). This allusion was to a banker, reputed to be an outstanding citizen in his community, of religious scruples and high moral character, who was arrested a

short time ago for embezzling funds of the bank of which he was an official. He lived in Perth Amboy, about 10 miles from the place of the trial of this petitioner. When the arrest of said banker was announced, the State of New Jersey was shocked. The implication of the Prosecutor's mention of this name was plain. He wanted the jury to feel that if this banker of unblemished character and lofty reputation turned out to be a criminal, then no attention should be paid to the character witnesses of this insignificant petitioner. No wonder the Prosecutor apologized for that remark, and petitioner's attorney moved for a mistrial. (App. p. 77a).

The trial court denied the motion for mistrial and ordered the jury to disregard the remarks about the banker in Perth Amboy and any investigation conducted by Senator Kefauver and warned the Prosecutor to confine his argument to the material facts in the case. (App. p. 77a). Evidently, the Prosecutor was trying to create an unholy atmosphere against the petitioner.

More fire was added to the inflammatory statements of the Prosecutor when he said in his summation:

> "Another thing, it is legal to bet in New Jersey at the legal race tracks, where the bets are carefully checked and the odds are figured after breakage and after the State gets a cut and the track gets a cut. What odds do these fellows pay? They take more than Monmouth Park and they do not even play square with the bettor." (App. p. 78a).

After objection by counsel, the Court said:

> "There is no evidence that the bookmakers do not play square with the bettors. I don't know what the odds are. They may be more than the pari-mutual pay, but there was no evidence as to that. Proceed and confine your summation to the evidence." (App. 78a).

To further excite the jury's passions, the Prosecutor wound up by injecting a personal note by concluding:

> "I leave it entirely to you. I live in Union County. You read the newspapers and you know what goes on. It is entirely up to the people. I leave the case for you to decide." (App. p. 78a).

2. All the above referred to arguments were, without doubt, extraneous to the issues involved. That they were beyond the bounds of propriety was attested to when the trial court restrained the Prosecutor when counsel objected. However, there is a duty placed upon the judge to confine the argument of a prosecuting attorney within proper bounds.

See *Ward* v. *U. S.*, 96 F. 2d. 189 (C.C.A. Ga.) 1938; *Mannix* v. *U. S.*, 140 F. 2d. 250 (C.C.A. Md.) 1944; *State* v. *Cummings*, 253 Pac. 2d. 321 (Sup. Ct. N. Mex.) 1953.

Mention of the Kefauver Committee before the jury waived the scepter of organized crime and corruption with its attendant circumstances and reference by the Prosecutor of what the newspapers say goes on in the community was a subtle means of arousing the jury to the presence of a simulated crime wave.

See *Turk* v. *U. S.*, 20 F. 2d. 129 (8 C.C.A.) 1927, where the Court said:

> "The reference of counsel to the crime wave in this county is outside of this case. There is no evidence of that kind. It is mere opinion of counsel."

The lower court told the jury to disregard that remark, but he denied defendant's motion for a mistrial. The judgment below, however, was reversed.

On the whole, the Prosecutor, in his zeal to convict, indulged in intemperate, prejudicial and inflammatory arguments during his summation. The effect of this haranguing

was to create an atmosphere in which it was impossible for petitioner to obtain a fair trial.

The Supreme Court of New Jersey, in the case at bar, said:

> "The comments by the prosecuting attorney in his summation upon matters outside the evidence were highly improper."

In *Berger* v. *U. S., Supra,* the Court stated:

> "The prosecuting attorney's argument to the jury, undignified and intemperate, containing improper insinuations was calculated to mislead the jury."

It was said in Re: *Beck* v. *U. S.,* (C.C.A.) 1929, 33 F. 2d. 107, 114:

> "A trial in the United States Court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of conviction."

Prosecutor's argument, not based upon evidence within the record, relating to the attitude of the press, held reversable error in the above cited case, notwithstanding objection made and sustained.

When there was no objection made to the statement of prosecuting attorney, (supra): "I leave it entirely to you. I live in Union County. You read the newspapers and you know what goes on," the failure of petitioner to make objection does not preclude the point from being raised in his behalf.

See *Nations* v. *U. S.,* 32 F. 2d. 598 (8 C.C.A.) 1929; *Federal Rules of Criminal Procedure* 52(b).

The attempt of the prosecutor to inject his personal knowledge as to gambling going on in Union County and to indicate his personal opinion, was highly prejudicial.

See *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

3. Another important element that aggravated the unfairness of the prosecuting attorney's conduct during the trial was that the eminence of his office, its dignity and prestige were pitted against the humble standing of this defendant. When the State oversteps the bounds of propriety, as was done in the lower court, the damaging consequences could not but militate against the chances of the petitioner receiving a fair trial.

The Supreme Court of New Jersey, in its opinion in this case, stated:

> "The comments by the prosecuting attorney in his summation upon matters outside the evidence were highly improper."

If that be so, how can one estimate the extent to which the highly improper conduct of the prosecuting attorney swayed the minds of the jury and tipped the balance of the scales against this petitioner?

The Supreme Court of New Jersey in *State* v. *Cleveland*, 6 N. J. 316, (1950) on p. 300:

> "The right of an accused to a fair trial, with the customary safeguards accorded him by our Constitution and our law, is in no way impaired or diminished by the strength or compelling character of the evidence against him."

Kotteakos v. *U. S.*, 328 U. S. 750 (1946) (note 19 of Opinion on bottom of p. 765):

In the *Kotteakos* case the Court cited a number of cases where there appeared a violation of a constitutional right. The weight of the evidence, when the violation of a consti-

tutional infringement is involved, is not a consideration in weighing defendant's case.

> "19. Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear. See Malinski *v.* N. U., 324 U. S. 401; Lyons *v.* Oklahoma, 322 U. S. 596, 597, n.l.; Bram *v.* U. S., 168 U.S. 532, 540-542; U. S. *v.* Mitchell, 137 F. 2d 1006, dissenting opinion at 1012.

There is involved a serious question in this petition as to whether or not the petitioner was deprived of a fair trial by the concededly highly improper comments the Prosecutor made in his summation to the jury. The law as stated in the Supreme Court of New Jersey in the case at bar is in conflict with the Federal cases construing the XIVth Amendment, Section 1 of the Constitution of the United States and the problem involving the situation herein is of fundamental importance in criminal practice.

The petitioner, therefore respectfully submits that his petition for a Writ of Certiorari be granted.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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U. S. CONSTITUTION.

Article 14 Sec. 1 2

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of New Jersey (R-84-90) is not yet reported.

Jurisdiction.

The jurisdictional requisites are alleged under Title 28 U. S. C. A, Sec. 1257 (3).

Questions Presented.

1. Whether the Supreme Court of the United States has jurisdiction to entertain this petition for a Writ of Certiorari to the New Jersey Supreme Court, when the

alleged Federal question has not been raised in the Courts below.

2. Whether the remarks of the prosecutor in his summation were such as to be prejudicial to the petitioner.

3. Whether the Supreme Court of the United States should grant certiorari to review alleged improper remarks of the Prosecutor in his summation where the trial court took corrective measures and thus the substantial rights of the petitioner were not impaired.

Statement.

This petition for certiorari seeks to review the judgment of the Supreme Court of New Jersey affirming a judgment of the Superior Court of New Jersey, Appellate Division, which dismissed an appeal taken from a judgment of conviction in the trial court (Union County Court, Law Division, Criminal), on an indictment for bookmaking. Petitioner was sentenced to State Prison for a minimum term of one year and a maximum term of two years. A fine of $1000.00 was imposed but suspended.

The sole ground on which the petition is predicated is that the petitioner was denied due process of law under Article 14, Sec. 1 of the United States Constitution by reason of alleged improper remarks by the prosecutor during his summation to the jury.

It should be pointed out that neither before the trial court (R. 50a, 53a) the Appellate Division of the Supreme Court (R. 72a, 73a, 77a) nor the Supreme Court of New Jersey (R. 84, 85) has the 14th Amendment of the United States Constitution or any other part thereof been injected into argument by the petitioner. The federal question is

raised for the first time on this petition. In fact, the petition itself does not assert the 14th Amendment of the United States Constitution was relied upon at any time below.

The alleged improper remarks of the prosecutor are set forth in the opinion of the Supreme Court of New Jersey (R. 88 to 90 inclusive). One is a casual reference to the Kefauver investigation and a case involving a Perth Amboy banker (R. 88 to 89) which the Prosecutor withdrew and for which he apologized and which the court ordered the jury to disregard. Secondly, in referring to bookmakers, the Prosecutor stated they do not play square with the bettors (R. 89). Upon objection thereto, the trial court pointed out to the Prosecutor and the jury there was no evidence as to that and admonished the prosecutor to confine his summation to the evidence. Thirdly, the prosecutor said to the jury, "You read the papers, and you know what goes on" (R. 90). No objection was interposed by the petitioner.

The charge of the court was agreeable to the petitioner as to all questions here involved.

Reasons for Denying Writ.

1. This Court is without jurisdiction because no Federal question was raised in the State Courts. The petitioner claims that he was denied due process of law under the 14th Amendment to the United States Constitution. This claim which the petitioner now makes was not raised in any of the State Courts of New Jersey nor did the State Supreme Court pass upon it. The first time any Federal question has been raised is on this petition in this Court, and consequently jurisdiction of this Court is lacking under 28 U. S. C. A. 1257.

2. The remarks of the prosecutor in his summation were not inflammatory or prejudicial to the rights of the petitioner. Assuming but not conceding such to be true, the trial court took necessary corrective measures and thus the substantial rights of the petitioner were not impaired. Therefore, this Court should not grant a Writ of Certiorari.

ARGUMENT.

POINT I.

The petition should be denied because of lack of jurisdiction in this Court.

One of the jurisdictional requirements on a petition to this Court for a Writ of Certiorari is that the Federal questions raised in such petition must have been first presented to the State Court and decided by such Court.

Murdock vs. *Memphis,* 20 Wall. 590, 22 L. Ed. 429;
Mutual Life Ins. vs. *McGrew,* 188 U. S. 291, 23 S. Ct. 375;
Rogers vs. *Clark Iron Co.,* 217 U. S. 589, 30 S. Ct. 693;
Johnson vs. *N. Y. Life Ins. Co.,* 187 U. S. 491, 23 S. Ct. 194.

The petitioner, under 28 U. S. C. A. 1257, is required to raise the Federal question in one or both of the Appellate Courts of the State of New Jersey.

House vs. *Road Improvement Dist. &c,* 266 U. S. 175, 45 S. Ct. 60;
Waters-Pierce Oil Co. vs. *Texas,* 212 U. S. 86, 29 S. Ct. 220;

Adams vs. *Russell*, 229 U. S. 353, 33 S. Ct. 846;
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Montana vs. *Rice*, 204 U. S. 291, 27 S. Ct. 281;
Missouri Pac. R. Co. vs. *Taber*, 244 U. S. 200, 37 S. Ct. 522.

A Federal question for jurisdictional purposes is not raised in time when it is raised for the first time upon a petition for a writ of certiorari in this Court.

Rogers vs. *Clark Iron Co.*, 217 U. S. 589, 30 S. Ct. 693;
Mallers vs. Commercial Loan Co., 216 U. S. 613, 30 S. Ct. 438;
Meyer vs. *Richmond*, 172 U. S. 82, 19 S. Ct. 106;
Johnson vs. *N. Y. Life Ins. Co.*, 187 U. S. 491, 23 S. Ct. 194;
Telluride Power Transmission Co. vs. *Rio Grande Western R. Co.*, 187 U. S. 569, 23 S. Ct. 178.

An examination of the transcript of the Trial Court proceedings (R. 50a, 53a), the opinion of the Appellate Division of the Superior Court (R. 72a, 73a, 77a) and the Supreme Court of New Jersey (R. 84, 85) shows that no Federal question was raised or passed upon by any of the three courts.

Cleveland, etc., R. Co. vs. *Cleveland*, 235 U. S. 50, 35 S. Ct. 21;
Speed vs. *McCarthy*, 181 U. S. 269, 21 S. Ct. 613;
Sweringer vs. *City of St. Louis*, 185 U. S. 38, 22 S. Ct. 569;

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Stembridge vs. *State of Georgia*, 343 U. S. 541, 72 S. Ct. 834;
Herndon vs. *State of Georgia*, 295 U. S. 441, 55 S. Ct. 794;
Andrews vs. *Virginian Railway Company*, 248 U. S. 272, 39 S. Ct. 101.

The Federal question now raised on this petition was neither presented to nor formed a part of the decisions of any of the State Courts and, accordingly, this Court does not have jurisdiction to grant the writ.

POINT II.

The remarks of the Prosecutor in his summation did not impair the substantial rights of the petitioner.

At the outset it is contended that the remarks made by the Prosecutor in his summation were not inflammatory or prejudicial to the substantial rights of the petitioner.

In the cases cited by the petitioner a flagrant disregard of human rights took place, in many instances throughout the trial as well as at summation, thus creating an air of prejudice and bias so as to influence the minds of the jury.

Such, however, is not the case here. In the first instance the Prosecutor in his summation referred to the Kefauver investigations and a recent conviction (not arrest, as stated by petitioner at page 5 in his petition) of a bank official in Perth Amboy. It is not shown by petitioner in what way the reference to the Kefauver investigation was prejudicial, since petitioner's counsel immediately objected to the reference as soon as it was begun. As to the reference to the bank official this was solely a comment on the weight to be given to a character witness.

The second objection is made by petitioner to the Prosecutor's reference that bookmakers do not play square with bettors. It is difficult to see how this remark is in any way prejudicial since the petitioner disclaimed he was a bookmaker.

Thirdly, the substance of the alleged prejudicial remarks is the Prosecutor's remark to the jury, "* * * You read the papers and you know what goes on". Again, since the Prosecutor has left it entirely to the jury to draw their own conclusions, no harm was done to the rights of the petitioner.

Assuming for the sake of argument that the above three statements were prejudicial, as to the first, the Prosecutor withdrew the remarks and apologized for making them. In addition the Court instructed the jury to disregard the remarks. As to the second remark made, the Court specifically enjoined the Prosecutor to confine his summation to the evidence, stating that there was no evidence to support the statement made by the Prosecutor. As to the third

allegedly prejudicial remark, no objection was interposed by petitioner's counsel.

The law in regard to the above is clear. If upon objection a remark is promptly withdrawn by the prosecutor, the defendant cannot be heard to claim prejudice.

> *Dunlop* vs. *United States,* 165 U. S. 484, 41 L. Ed. 799.

Furthermore whether the remark was withdrawn or not, prejudice cannot be claimed where the trial judge orders that the remarks be stricken from the record and directs the jury to disregard them.

> *State* vs. *Randall,* 95 New Jersey Law 452, (E. & A. 1921);
> *State* vs. *Hernia,* 68 New Jersey Law 299 (E. & A. 1902);
> *State* vs. *Bolles,* 13 New Jersey Misc. 273 (S. Ct. 1935).

In addition, a petitioner cannot claim prejudice if defense counsel does not interpose a timely and proper objection to the allegedly improper remarks.

> *State* vs. *Terry,* 91 New Jersey Law 539 (E. & A. 1918);
> *State* vs. *Hauptmann,* 115 New Jersey Law 412 (E. & A. 1935); Certification denied 296 U. S. 648, 80 L. Ed. 461 (1935).

As the Supreme Court of New Jersey concluded, it cannot be said that there was prejudice done the petitioner, in view of the corrective action taken by the prosecutor and the trial court and the failure of defense counsel in an instance to object.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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